

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 37

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte S. CHRISTINE ONG, SANDRA D. SCHREGENBERGER
and PRADEEP P. SHIRODKAR

Appeal No. 96-0359
Application No. 08/083,866¹

HEARD: March 12, 1999

Before JOHN D. SMITH, WALTZ, and SPIEGEL , Administrative Patent Judges.
SPIEGEL , Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal under 35 U.S.C. § 134 from the examiner's final rejection of claims 3, 4, 6, 8, 9, 13 and 14. Claims 10 through 12, the only other claims pending in the application, have been withdrawn from further consideration under 37 C.F.R. § 1.142(b) as not readable on the elected invention.

¹ Application for patent filed June 28, 1993. According to appellants, this application is a continuation of Application 07/734,989, filed July 24, 1991, now abandoned, which is a continuation-in-part of Application 07/665,054, filed March 06, 1991, now abandoned.

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We AFFIRM.

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BACKGROUND

The appellant's invention relates to an ethylene polymer blend for blown film production consisting essentially of a high molecular weight (HMW) component and a relatively low molecular weight (LMW) component wherein the blend and the individual components have defined properties. According to appellants, films with good mechanical properties, e.g., Dart Drop Impact Resistance and Elmendorf Tear, are obtainable if, in addition to the necessary properties of density, flow index and melt flow index, the polymer blend used to make the film also has a relatively low dynamic elasticity which, in turn, requires its HMW component to have a molecular weight distribution, expressed as a flow ratio, of no greater than 15 (Brief pages 2-3).

Claim 14 is illustrative of the claimed subject matter and reads as follows:

14. A blend for blown film production, wherein the blend exhibits a density of about 0.940 to 0.960 g/cc, an I_{21} of about 4 to 12 g/10 min., a MFR of about 75 to 180, and a dynamic elasticity of about 0.45 to 0.65 at a corresponding complex viscosity of about 6E5 to 14E5 poises, wherein the blend consists essentially of
at least about 0.5 weight fraction of a relatively high molecular weight (HMW) component having a density of at least about 0.910 g/cc, a flow index or high load melt index (I_{21}) of no higher than about 0.8 g/10 min., a molecular weight distribution indicated by a flow ratio (FR) no higher than about 15, and a dynamic elasticity at 0.1 rad./sec., of no higher than about 0.75 at a corresponding complex viscosity at 0.1 rad./sec. of no higher than about 7E6.; and
a relatively low molecular weight (LMW) component having a density of at least about 0.940 g/cc and a melt index (I_2) of at least about 100 g/10 min
wherein each of said relatively high molecular weight (HMW) component and said relatively low molecular weight (LMW) component is selected from the group consisting of a homopolymer of ethylene and at least one copolymer of a preponderance of ethylene with a minor amount of a 1-olefin containing 3 to about 10

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carbon atoms as comonomer, said film exhibiting a Dart Drop Impact resistance (F_{50} , ASTM D1709) of 250 to 600 grams.

The prior art references of record relied upon by the examiner in rejecting the appealed claims are:

Bailey et al. (Bailey)	4,461,873	Jul. 24, 1984
Lee et al. (Lee)	5,126,398	Jul. 30, 1992 ²

The prior art reference relied upon by this Merits Panel is:

Kirk-Othmer ENCYCLOPEDIA OF CHEMICAL TECHNOLOGY, third edition, volume 16, Herman F. Mark et al., editors, published in 1981 by John Wiley & Sons, New York, pages 388-390. (Kirk-Othmer)

ISSUES

The issues presented for review are: (1) whether the examiner erred in rejecting claims 3, 4, 6, 8, 9, 13 and 14 under 35 U.S.C. § 103 as unpatentable over Bailey, (2) whether the examiner erred in rejecting claims 3, 4, 6, 8, 9, 13 and 14 under 35 U.S.C. § 103 as unpatentable over Lee, and (3) whether the examiner erred in provisionally rejecting claims 3, 4, 6, 8, 9, 13 and 14 as being unpatentable over claims 1-6 and 12-14 of copending application 08/083,864.

According to the examiner, the prior rejection of claims 3, 4, 6, 8, 9, 13 and 14 under 35 U.S.C. § 102(b) as anticipated by Bailey has been withdrawn (Answer page 2).

DELIBERATIONS

² Lee was filed July 2, 1991 as a continuation of Application 07/271,639, filed November 16, 1988, now U.S. Patent No. 5,047,468. Thus, Lee is a proper prior art reference.

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Our deliberations in this matter have included evaluation and review of the following materials:

(1) the instant specification, including all of the claims on appeal, (2) appellants' Appeal Brief (paper no. 25), (3) the Examiner's Answer (paper no. 26), (4) the appellants' Reply Brief (paper no. 28), (5) the above-cited prior art references, and (6) the pending claims in Application 08/083,864.

OPINION

1. Rejection of claims 3, 4, 6, 8, 9, 13 and 14 under 35 U.S.C. § 103 as unpatentable over Bailey

At the outset, we note that appellants state claims 6 and 13 should be considered independently (Brief page 3). Accordingly, dependent claims 3, 4, 8 and 9 will stand or fall with independent claim 14. Claims 6 and 13 will stand or fall individually.

We have carefully reviewed each of appellants' arguments for patentability, as well as the affidavit evidence relied upon in support thereof. However, we concur with the examiner that the claimed subject would have been obvious to one of ordinary skill in the art within the meaning of § 103 in view of Bailey. Accordingly, we will sustain the rejection of claims 3, 4, 6, 8, 9, 13 and 14 as unpatentable over Bailey for essentially those reasons expressed in the Answer.

Bailey describes ethylene polymer blends of a high molecular weight (HMW) component, preferably an ethylene-mono-1-olefin copolymer, and a low molecular weight (LMW) component, preferably an ethylene homopolymer, useful in manufacturing films or in blow molding techniques (abstract). The following tables summarize the properties for the claimed blend and its HMW and LMW components and for Bailey's blend and his HMW and LMW component, generally (Tables I

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and III; column 3, lines 24-35), preferably (Tables I and III; column 3, lines 24-35), and example 11, which exhibits "excellent impact properties" (Tables XV and XVI; column 22, lines 32-42).

Table A -- Blend Properties

Property	Claim 14	Bailey's generally	Bailey's preferred	Bailey's example 11
density, g/cc	about 0.940 to 0.960	0.940-0.965	0.950-0.960	0.9578
HLMI (I_{21}), g/10 min.	about 4 to 12	3-34	5-12	5.0
MFR (I_{21}/I_2) ³	about 75 to 180	not given, but calculated at 5- 3400⁴	not given	not given⁵
dynamic elasticity at a complex viscosity of about 6E5 to 14E5 poises	about 0.45 to 0.65	not given	not given	not given
weight fraction HMW component	at least about 0.5	0.40 to 0.70	about 0.50 to about 0.55	0.50
dart drop of blown film product thereof, g	250-500	formula provided at column 26, line 56	formula provided at column 26, line 56	240

Table B -- HMW component Properties

Property	Claim 14	Bailey's generally	Bailey's preferred	Bailey's example 11
density, g/cc	at least about 0.910	about 0.930-0.955	about 0.930-0.945	0.9360

³ The specification defines "melt flow ratio" or MFR as (high load melt index)/(melt index) using a high load of 21 kg versus a melt load of 2 kg (page 6). Bailey uses slightly different loads, i.e. a high load of 21.6 kg versus a melt load of 2.16 kg (column 3, lines 26-29).

⁴ See Answer page 3, fn. 1.

⁵ According to Bailey, example 11 blend has an $I_{21.6}$ of 5.0 and an $I_{2.16}$ of 0.06 (Table XVI, column 22), which would provide an $I_{21.6}/I_{2.16}$ of 83.

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HLMI (I_{21})	no higher than about 0.8	0.1-1.5	0.2-0.6	0.24
flow ratio (I_{21}/I_5) ⁶	no higher than about 0.8	not given	not given	not given
dynamic elasticity at a complex viscosity at 0.1 rad./sec. of no higher than about 7E6	no higher than about 0.75	not given	not given	not given

Table C -- LMW component Properties

Property	Claim 14	Bailey's generally	Bailey's preferred	Bailey's example 11
density, g/cc	at least about 0.940	about 0.945-0.975	about 0.950-0.975	0.9690
MI (I_2), g/10 min.	at least about 100	45-300	100-300	108

Using multiple regression analysis, Bailey also concluded that the dart drop impact resistance of a blend is significantly dependent on the density and HLMI of the HMW component, and provides a formula for dart impact values (column 26, line 57 through column 27, line 8).

When a claimed product and a prior art product reasonably appear to be substantially the same, the burden is shifted to the applicant to prove with objective evidence that the product of the prior art does not necessarily have the characteristics attributed to the claimed product. *In re Spada*, 911 F.2d 705, 708, 15 USPQ2d 1655, 1658 (Fed. Cir. 1990); *In re Best*, 562 F.2d 1252, 1255,

⁶ The specification defines "flow ratio" as (high load melt index)/(intermediate load melt index) using a high load of 21 kg and an intermediate load of 5 kg (page 8).

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195 USPQ 430, 433-34 (CCPA 1977). In the present case, we find that the ethylene blends of Bailey sufficiently correspond to appellants' claimed ethylene blends to require appellants to establish on this record that ethylene blends within the scope of the appealed claims are patentably distinct from the ethylene blends fairly taught by Bailey. However, in our view, appellants have not met their burden.

Appellants argue that using the most "optimistic" HMW component data in Bailey, i.e., a density of 0.930 and a HLMI of 0.1, Bailey's regression equation, at best, *predicts* a maximum dart drop value of only 239, while claim 14 requires a dart drop range of 250 to 600 (Brief pages 3-6, 11-12; Shirodkar II (affidavit executed January 13, 1995) at pages 1-2). However, a "predicted" value is an estimated value.⁷ Moreover, we agree with the examiner that it would have been obvious to one of ordinary skill in the art to adjust the density and HLMI of the HMW component to optimize the dart drop value given its significant dependency on the density and HLMI of the HMW component as disclosed by Bailey's regression model at column 26, line 57 through column 27, line 8 (Answer pages 11-12). *In re Boesch*, 617 F.2d 272, 276, 205 USPQ 215, 219 (CCPA 1980); *In re Aller*, 220 F.2d 454, 456, 105 USPQ 233, 235 (CCPA 1955).

Appellants also argue Bailey's regression model does not predict the dart drop values actually obtained in the examples of the specification (Brief pages 3-6, 8-12, 16-17; Shirodkar I (affidavit

⁷ For example, Bailey's example 11 produced a film which had a measured dart drop of 240 g., but a "predicted" dart drop of only 216 g.

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executed March 19, 1993) at pages 1-3). However, appellants have not shown that Bailey's regression model is equally applicable to the experimental data in the examples of the specification. No direct comparison has been made between a film made from the claimed ethylene blend and a film made from Bailey's ethylene blend under identical manufacturing conditions. There is no showing that the specification data was obtained under identical experimental conditions, etc. and, if not, what the effects of any differences might be on the measured data. For example, Bailey used different load amounts in obtaining his HLMI data. Moreover, appellants have not shown that any difference between the "predicted" result and the "measured" result is an "unexpected" difference. Appellants have the burden of explaining the data. Therefore, based on this record, we find appellants' arguments and the Shirodkar I and II affidavits lack sufficient probative value to overcome this rejection.

Appellants argue Bailey fails to mention "elasticity" (Brief page 6). However, appellants have not proffered the requisite objective evidence to establish that Bailey's ethylene blend and HMW component do not have the claimed elasticity.

Appellants argue Bailey is not enabled for the production of HMW and LMW components used to make his blends, especially in regard to claim 13 (Brief pages 6-8 and 11-16). Thus appellants argue that Bailey does not describe the process limitations nor the product limitations therein (Brief page 3; Reply Brief page 1).

Given Bailey's disclosure of using a high activity titanium/magnesium catalyst in conjunction with an organoaluminum cocatalyst to produce the HMW or LMW polymer components (column 3, lines

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54-62; column 5, lines 27-33), we are convinced the Bailey patent disclosure is an enabling prior art reference. A U.S. patent, e.g., Bailey, is presumed valid (35 U.S.C. § 282), and this presumption of validity applies to the patent's disclosure as well as to each of its claims. *In re Spence*, 261 F.2d 244, 246, 120 USPQ 82, 83 (CCPA 1958). Further, in an obviousness assessment, skill is presumed on the part of the artisan, rather than the lack thereof. *In re Sovish*, 769 F.2d 738, 742, 226 USPQ 771, 774 (Fed. Cir. 1985). After reviewing all the evidence of record on the issue of enablement of the Bailey patent, it is our judgment that appellants have not provided sufficient evidence to establish that Bailey is a non-enabling disclosure with respect to the production of HMW and LMW components and blends as described.

We treat product-by-process claim 13 separately. The patentability of a product-by-process claim is based on the product itself. Where, as here, a product-by-process claim is rejected over a prior art product that appears to be the same or similar to the claimed product, although produced by a different process, the burden is on applicants to produce evidence establishing an unobvious difference between the claimed product and the prior art product. *In re Thorpe*, 777 F.2d 695, 697, 227 USPQ 964, 966 (Fed. Cir. 1985); *In re Marosi*, 710 F.2d 799, 803, 218 USPQ 289, 292-93 (Fed. Cir. 1983). Appellants have not proffered the requisite objective evidence to establish that the claimed process of preparation produces an unobvious difference, e.g. in property, between the claimed product and ethylene polymer blend product of Bailey.

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Appellants argue Bailey does not provide melt flow ratio (MFR) data and the examiner's use of calculations "based on relationships described in applicants' specification" is hindsight (Reply Brief pages 5-6 and 18). However, "melt flow ratio" appears to be a recognized term of art.⁸ Secondly, appellants have not offered any objective evidence to establish that Bailey's polymers do not necessarily possess the claimed melt flow ratios. The Tong affidavit, executed April 5, 1993 for copending application '864 and made of record in this application, acknowledges that polydispersity index and melt flow ratio **both** provide information on molecular weight distribution, although they can have different biases (page 2). However, since the blends of Bailey would appear to have the same or similar polydispersity index and melt flow ratio properties to that claimed, they would also appear to have the same or similar molecular weight distribution. The Tong affidavit does not directly compare the claimed blend and Bailey's blend to establish Bailey's blend lacks the claimed melt flow ratio. Although appellants rely on "calculated" comparisons, appellants have not provided any reasoning to show that one of ordinary skill in the art would have reasonably expected Bailey's regression model equations to be equally applicable to the experimental data in the specification. There is no showing that the specification's experimental data was obtained under identical experimental conditions to Bailey or, if not, what the effects of any differences might reasonably be expected to be. The argument that

⁸ For example, Lee states melt flow ratio is the ratio of flow index to melt index, where flow index is determined under ASTM D-1238 and is measured at 10 times the weight used in determining the melt index (column 5, lines 14-20). Bailey also uses ASTM-1238 to determine melt index at a weight or "load" of 2.16 kg and high load melt index at a 10 times higher load of 21.6 kg.

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Bailey does not suggest the claimed products because Bailey does not provide flow ratio data is not evidence.

As to claim 6, appellants argue Bailey does not disclose or suggest the specific blend MFR range of 80-150 (Brief page 3). For the reasons *supra*, we find the examiner had a reasonable basis for believing the blend MFR range of "about 80 to 150" recited in claim 6 fell within Bailey's generic disclosure (Answer page 7). We also note that appellants have not shown criticality in the claimed blend MFR range of "about 80 to 150" by evidence of unexpected results. *In re Wertheim*, 541 F.2d 257, 267, 191 USPQ 90, 100 (CCPA 1976). Therefore, based on this record, we are constrained to sustain the examiner's rejection of claim 6 as unpatentable over Bailey.

The rejection of claims 3, 4, 6, 8, 9, 13 and 14 under 35 U.S.C. § 103 as unpatentable over Bailey is sustained.

2. Rejection of claims 3, 4, 6, 8, 9, 13 and 14 under 35 U.S.C. § 103 as unpatentable over Lee

At the outset, we note that appellants state claims 6 and 13 should be considered independently (Brief page 3). Accordingly, dependent claims 3, 4, 8 and 9 will stand or fall with independent claim 14. Claims 6 and 13 will stand or fall individually.

We have carefully reviewed each of appellants' arguments for patentability, as well as the affidavit evidence relied upon in support thereof. However, we concur with the examiner that the claimed subject would have been obvious to one of ordinary skill in the art within the meaning of § 103

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in view of Lee. Accordingly, we will sustain the rejection of claims 3, 4, 6, 8, 9, 13 and 14 as unpatentable over Lee for essentially those reasons expressed in the Answer.

Lee discloses a process for *in situ* blending of polymers comprising continuously coating under polymerization conditions, a mixture of ethylene and one or more alpha-olefins having at least 3 carbon atoms in at least two fluidized bed reactors connected in series, using the same catalyst as recited in claim 13, such that an ethylene copolymer having a high melt index [i.e., LMW component] is formed in one reactor and an ethylene copolymer having a low melt index [i.e., HMW component] is formed in another reactor (see columns 2-4). The following table summarizes some of the claimed reaction conditions versus corresponding conditions disclosed in Lee's Example 3 (Table bridging columns 7-10).

reactor condition	claimed HMW production	Lee's HMW production ex. 3	claimed LMW production	Lee's LMW production ex. 3
sequence position	first	second	second	first
hydrogen/ethylene molar ratio	no higher than about 0.3	0.0443	at least about 0.9 & at least about 8.0 times that in the HMW reactor	1.93
ethylene partial pressure	no higher than about 100 psia	147 psia	at least about 1.2 times that in the HMW reactor	73 psia

Example 3 (Table bridging columns 9-10) also discloses an ethylene polymer blend having a density of 0.922 g/cc, a flow index of 11.6 g/10 min., and a melt flow ratio⁹ of 51.

⁹ According to Lee, melt flow ratio is defined as (flow index)/(melt index) wherein the flow index is determined using ten times the weight used in determining the melt index (column 5, lines 13-20).

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According to the examiner, in regard to appealed claim 13, (1) the claimed blend MFR overlaps with Lee's disclosure since each polymer component of Lee may individually have an MFR of about 20 to about 70 (column 2, especially lines 40-41) and the term "about" allows some latitude, (2) the claimed blend density overlaps with Lee's disclosure because each copolymer may have an individual density up to about 0.965 (column 2, lines 38-40), (3) one would reasonably presume Lee's polymer would have the claimed dynamic elasticity in view of the similarities between the processes of Lee and appellants' claim 13, and (4) appellants have not shown that the process limitations of claim 13 give rise to unexpected results in the product, given that Lee teaches the order of producing the HMW and LMW components can be reversed (Answer pages 8-10). As to claim 6, the examiner states, "the claimed 'about...10 g/10 min.' reads on Lee's 11.6 g/10 min." (Answer page 10).

Appellants argue (1) the claimed high density polyethylene blend density range with a lower limit of 0.940 excludes the linear low density polyethylene blends of Lee, (2) Lee fails to describe a melt flow ratio of 80 to 150 as required by claim 14, (3) Shirodkar II states Lee is not directed to any particular product, i.e. film or blow molding, and the skilled artisan would not know how to produce a film with superior impact properties based on Lee's disclosure, (4) Lee not only does not enable making the HMW component of the claims, but also reverses the HMW and LMW formation reactors in the claimed process, and (5) Lee does not describe elasticity or dynamic elasticity (Brief pages 18-21; Reply Brief pages 1-4).

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First, Table 3 on page 389 in Kirk-Othmer indicates that LLDPE fluid bed gas phase manufacturing processes can yield LLDPE with densities from 0.918-0.94 g/cm³. Thus, it is not clear that a polyethylene blend density with a lower limit of "about 0.940" necessarily excludes the polyethylene blends of Lee, especially since, as noted by the examiner, the individual density of each component HMW and LMW polymer may be as high as 0.965 g/cc. which overlaps with the claimed density values (in Lee see column 2, lines 38-40; Answer page 15). Second, we agree with the examiner that the claimed blend MFR overlaps with Lee's disclosure since each polymer component of Lee may individually have an MFR of about 20 to about 70 (column 2, especially lines 40-41) and the term "about" allows some latitude (Answer page 9). Third, Lee also appears to be concerned with the production of LLDPE resins suitable for film production (e.g., "[t]he bulk of LLDPE is used in film production" (column 1, lines 37-38) and the discussion of film production methods in the paragraph bridging columns 1-2). Further, skill is presumed on the part of the artisan, rather than the lack thereof. *In re Sovish, supra*. Fourth, as indicated *supra*, a U.S. patent (e.g., Lee) and its disclosure are presumed valid (35 U.S.C. § 282), and this presumption of validity applies to the patent's disclosure as well as to each of its claims. *In re Spence, supra*. After reviewing all the evidence of record on the issue of enablement of the Lee patent, it is our judgment that appellants have not provided sufficient evidence to establish that Lee is a non-enabling disclosure with respect to the production of HMW and LMW components and blends as described. Finally, when a claimed product and a prior art product reasonably appear to be substantially the same based on a similarity of reactants, reaction conditions

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and properties, the burden is shifted to the applicant to prove with objective evidence that the product of the prior art does not necessarily possess the characteristics attributed to the claimed product. *In re Spada, supra*. In the present case, we find that the ethylene blends of Lee sufficiently correspond to appellants' claimed ethylene blend to require appellants to establish on this record that ethylene blends within the scope of the appealed claims are patentably distinct from the ethylene blends fairly taught by Lee. However, in our view, appellants have not met their burden.

At page 18 of the Brief, appellants argue claim 6 "which refers to MFR of 80 to 150 is not described or enabled by the Lee disclosure." However, we agree with the examiner "the claimed 'about...10 g/10 min.' reads on Lee's 11.6 g/10 min." (Answer page 10) and find that Lee is an enabling disclosure for the reasons discussed above.

Finally, at pages 18 and 20 of the Brief, appellants argue the process parameters in Lee are different from those of claim 13, specifically Lee calls for the lowest ethylene partial pressure in the zone in which the HMW component is made. In other words, Lee reverses the two reactors used in the claimed process (Reply Brief page 2).

As discussed in the obviousness rejection based on Bailey above, the patentability of a product-by-process claim is based on the product itself and in cases where a product-by-process claim is rejected over a prior art product that appears to be the same or similar to the claimed product, although produced by a different process, the burden is on applicants to produce evidence establishing an unobvious difference between the claimed product and the prior art product. We agree with the

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examiner that appellants have not proffered the requisite objective evidence to establish that the claimed process of preparation produces an unobvious difference, e.g. in property, between the claimed product and ethylene polymer blend product of Lee (Answer page 15). Moreover, Lee explicitly discloses that the two reactors used in the ethylene blend production process *can* be reversed (paragraph bridging columns 4-5).

Therefore, based on this record, we sustain the examiner's rejection of claims 3, 4, 6, 8, 9, 13 and 14 under 35 U.S.C. § 103 as unpatentable over Bailey is sustained.

3. Rejection of claims 3, 4, 6, 8, 9, 13 and 14 under the judicially created doctrine of obviousness-type double patenting over copending application 08/083,864.

The examiner states

Claims 3, 4, 6, 8, 9, 13, and 14 stand provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over the claims of copending application Serial No. 08/083,864. Although the conflicting claims are not identical, they are not patentably distinct from each other because the two sets of claims overlap significantly in terms of the properties. Since the products are made by similar processes, it follows that they would possess substantially the same properties. *In re Sussman*, 60 USPQ 538 (CCPA 1944).

This is a *provisional* obviousness-type double patenting rejection because the conflicting claims have not in fact been patented. (Answer page 11)

Appellants argue (1) the appealed claims are for film production and the title of copending '864 application includes a reference to resins for blow molding, (2) the rejection is premature, and (3) without a factual basis, because (i) the claims of copending '864 require polydispersity index values not recited in the instant claims, (ii) the instant claims require elasticity values not recited in the copending

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'864 claims, (iii) the instant claims recite a FR of no higher than about 15, whereas the claims of copending '864 recite a FR greater than 10 (claim 1 of '864) and 10 to 30 (claim 5 of '864), and (iv) the claims of copending '864 are silent as to "film" production and dart drop measurements (Brief pages 21-23, Reply Brief page 17).

These arguments are not persuasive. It appears that the same ethylene blends can be used for either the manufacture of film or in blow molding techniques (see, e.g., Bailey's abstract). Secondly, "provisional" rejections of the sort here involved are authorized by MPEP § 804 and have been sanctioned by this Board (see, e.g., *Ex parte Karol*, 8 USPQ2d 1771 (Bd. Pat. App. & Int. 1988)) and by the predecessor of our reviewing court (see e.g., *In re Wetterau*, 356 F.2d 556, 557-58, 148 USPQ 499, 501 (CCPA 1966)). Third, merely reciting a new property or use of a product does not make that product unobvious over another identical or substantially identical product. *Titanium Metal Corp. v. Banner*, 778 F.2d 775, 782, 227 USPQ 773, 777-78 (Fed. Cir. 1985). Here, the significant overlap of blend density, high load melt index and melt flow ratio, together with the significant overlap of HMW component weight fraction, density high load melt index and flow ratio as well as the overlap of LMW component density and melt index between the two sets of claims provides a reasonable basis for believing the ethylene polymer blends of the two copending applications are identical or substantially identical.

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In light of the foregoing, we shall sustain the examiner's *provisional* obviousness-type double patenting rejection of claims 3, 4, 6, 8, 9, 13 and 14 over claims 1-6 and 12-14 of copending application 08/083,864.

OTHER MATTERS

In the event of further prosecution, appellants and the examiner are advised to consider whether the oath in this continuation-in-part application complies with 37 C.F.R. §§ 1.53 and 1.56.

CONCLUSION

In summary, (1) the rejection of claims 3, 4, 6, 8, 9, 13 and 14 under 35 U.S.C. § 103 as unpatentable over Bailey is sustained, (2) the rejection of claims 3, 4, 6, 8, 9, 13 and 14 under 35 U.S.C. § 103 as unpatentable over Lee is sustained, and (3) the provisional rejection of claims 3, 4, 6, 8, 9, 13 and 14 as being unpatentable over claims 1-6 and 12-14 of copending application 08/083,864 is sustained.

Accordingly, the decision of the examiner is AFFIRMED.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

AFFIRMED

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JOHN D. SMITH)
Administrative Patent Judge)
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APPEAL NO. 96-0359 - JUDGE SPIEGEL
APPLICATION NO. 08/083,866

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DECISION: **xxxxED**

Prepared By: S. Davis

DRAFT TYPED: 18 Jan 02

FINAL TYPED: